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88-385

No. 88-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

OFELIA RODRIGUEZ DE QUIJAS, ET AL.,
Petitioners,

VS.

SHEARSON/AMERICAN EXPRESS, INC., ITS SUCCESSORS AND ASSIGNS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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31 August, 1988

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3033

QUESTION PRESENTED

1. Are claims under § 12(2) of the 1933 Securities Act now arbitrable under predispute broker contracts?

2. If such claims are now arbitrable, may these Petitioners be compelled to submit such claims to arbitration pursuant to terms of a predispute contract executed at a time when § 12(2) claims were clearly not subject to arbitration?

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No. 88-

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OFELIA RODRIGUEZ DE QUIJAS, ET AL.,
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VS.

SHEARSON/AMERICAN EXPRESS, INC., ITS SUCCESSORS AND ASSIGNS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REFERENCE TO OPINIONS

The opinion of the United States Court for the Southern District of Texas, Brownsville Division, dated November 18, 1986, directed to arbitration all claims of Petitioners[1] except their § 12(2) claims under the 1933 Securities Act.

The opinion of the United States Court of Appeals for the Fifth Circuit reversed the district court and held that § 12(2) claims *were* subject to arbitration.

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1. Petitioners include Ofelia Rodriguez de Quijas, Jose Luis Rodriguez, Jose Luis Rodriguez Moreno, Martha Leticia Rodriguez Moreno, Luis Alejandro Rodriguez Moreno, Beatriz Rodriguez, Mary Grace Norman, Adelina Trapero, Gene Griffin, Gertrud Griffin.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1988 and the motion for rehearing denied on June 22, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court exercised jurisdiction pursuant to 15 U.S.C. § 77v, 15 U.S.C. § 78aa, 15 U.S.C. § 80b-14, 18 U.S.C. § 1964, 28 U.S.C. § 1332(a)(1).

STATUTES INVOLVED

Section 14 of the 1933 Securities Act, 15 U.S.C § 77n, provides in pertinent part that:

> "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

Section 12(2), 15 U.S.C. § 77l(2), provides in pertinent part that:

Any person who—

* * *

> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,
>
> shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction . . .

The Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part that:

> ". . . an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

Petitioners are members of a group of some seventeen first-time investors, the majority of whom were minors, widows, individuals dying of cancer, or individuals unable to understand English. All signed standard-form brokerage house contracts which were typically presented face down in a fashion which obscured arbitration clauses. Most were denied copies of the documents signed. Such individuals alleged that an employee of Shearson/American Express defrauded each. Pursuant to the motions of Defendant Shearson/American Express, all claims except § 12(2) claims were ordered submitted to arbitration. On the basis of *Shearson/American Express, Inc. v. McMahon*, 96 L.Ed.2d 185 (1987), the 5th Circuit Court of Appeals thereafter reversed the District Court on the § 12(2) arbitrability issue holding that such claims were arbitrable.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE RELEVANT OPINIONS OF THIS COURT, WITH THE DECISIONS OF OTHER CIRCUIT AND STATE COURTS WHICH HAVE CONSIDERED THE ISSUE, AND WITH RECENT EXPRESSION OF CONGRESSIONAL INTENT.

1. The petition should be granted because the court of appeals failed to follow this Court's decision in *Wilco v. Swan*, 346 U.S. 427 (1953), which held that § 12(2) claims under the 1933 Securities Act were not subject to compulsory predispute arbitration terms. In *Wilco*, a seven justice majority determined that a predispute agreement to arbitrate § 12(2) claims were not enforceable because of Congressional intent. Despite this Court's refusal to overrule its prior *Wilco* opinion in *Shearson/American Express, Inc. v. McMahon*, 96 L.Ed.2d 185 (1987), the 5th Circuit Court of Appeals held here, and without referring to *Chang v. Lin*, 824 F.2d 219 (2nd Cir. 1987), that a predispute agreement to arbitrate Petitioners' § 12 (2) claims *was* enforceable.

2. The writ should also be granted because this court of appeals' decision conflicts with another federal court of appeals' decision, *Chang v. Lin*, 824 F.2d 219 (2nd Cir. 1987) as well as numerous lower federal and state court decisions.

3. Additionally, Congress, after conducting hearings with respect to proposed amendments to the 1934 Securities & Exchange Act, has now proposed H.R. 4960 (100th Congress, 2nd Session) which specifically addresses *McMahon*. Such legislation does not propose parallel arbitration changes to the 1933 Act, strongly suggesting again, as in 1975, a Congressional endorsement of *Wilco*.

4. Finally the writ should be granted because it is inappropriate for a court of appeals to, in effect, overrule clear Supreme Court precedent. See *Thurtson Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). That is more so the case when the Supreme Court has itself recently declined to alter its own precedent as was the case in *McMahon*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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31 August, 1988

APPENDIX

(Filed November 18, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C. A. NO. B-85-360

OFELIA RODRIGUEZ DE QUIJAS, ET AL.

VS.

SHEARSON/AMERICAN EXPRESS, INC. Its Successors and Assigns, and JON GRADY DEATON, Jointly and Severally

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MEMORANDUM AND ORDER

FACTS

In August of 1985, Plaintiffs Ofelia Rodriguez de Quijas, *et al.* brought suit against Defendants Shearson/American Express and Jon Grady Deaton based upon a series of transactions involving the financial management of separate accounts totalling approximately $190,000. Plaintiffs allege that Defendant Deaton, the manager of the discretionary account with Shearson, fraudulently induced the Plaintiffs to enter into the investment contract. Additionally, it is alleged that Defendants conducted a number of unauthorized and/or fraudulent transactions and misrepresented to Plaintiffs the nature of these transactions. These transactions, it is asserted, were designed

to generate commissions and profits for Defendants and resulted in staggering losses for the Plaintiffs. Plaintiffs bring this action under sections 12(2) and 17(a) of the 1933 Federal Securities Act and sections 10(b) (and rule 106-5 thereunder), 15(c)(1), 15(c)(2) of the Securities Exchange Act of 1934 (and rules 15c1-2, 15c1-4, 15c1-6, thereunder). Plaintiffs also assert civil RICO claims based upon predicate acts of mail and wire fraud, in violation of 18 U.S.C. § 1341, § 1343, and § 1961, as well as acts of securities fraud in violation of TEX. CIV. ART. 581-33(A)(2), claims under the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. § 17.46 *et seq.* (Vernon 1986), and common law breach of contract, fraud, and misrepresentation.

Defendants have filed a Motion to Compel Arbitration of all the claims arising out of transactions in question pursuant to an arbitration clause in the investment contracts signed by the Plaintiffs. The Court must now decide which of the claims must be arbitrated.

A) *The Arbitration Clause*

The question whether arbitration is controlling is determined on the basis of the existence of an arbitration clause that on its face appears broad enough to encompass the parties' claims. *Mar-Len of LA., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985); *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 338 (5th Cir. 1984). The Fifth Circuit in *Commerce Park* reasoned that when confronted with an arbitration clause, a presumption arises that arbitration should not be denied "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Id. quoting Wick*

v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979). Thus, as a general rule, whenever the scope of an arbitration clause is in question, the court should construe the clause in favor of arbitration. *United Steelworkers of America v. Warrior & Gulf Navigational Co.*, 363 U.S. 574, 583, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). The Court, after reviewing the arbitration clause in this case, is of the opinion that it is more than sufficiently broad to cover all the claims involved in this cause of action.[1]

The Plaintiffs contend that the arbitration clause was fraudulently induced and thus cannot control the disposition of this case. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967), the United States Supreme Court dealt with the issue of whether fraudulent inducement can be brought before an arbitrator instead of district court. The Supreme Court reasoned that:

> If the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the 'making' of the agreement to arbitrate - the federal court *may* proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement generally . . . [A] federal

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1. The arbitration agreement in paragraph 13 reads as follows:

> "Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. as I may elect. If I do not make my election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitration may be entered in any court having jurisdiction thereof."

court may consider only issues relating to the making and performance of the agreement to arbitrate.

Id. at 403-04, 87 S.Ct. at 1805-06.

The Seventh Circuit in *Schacht v. Beacon Ins. Co.*, 742 F.2d 386, 389 (7th Cir. 1984), reaffirmed this position and noted that only when the claimed contractual invalidity goes to the arbitration clause itself does the court decide the existence of a contractual provision. *See also Mar-Len of LA., Inc. v. Parsons-Gilbane*, 773 F.2d 633 (1985) (alleging fraud in the inducement of a modification to the original contract).

Although Plaintiffs, in their brief in Opposition to Motions to Dismiss and Compel Arbitration, purport to allege only fraud in the inducement of the arbitration clause itself, the Court sees nothing before it which would lead the Court to believe the alleged fraud in the inducement applied solely to the arbitration clause. To the contrary, in all the Plaintiffs' Affidavits in Opposition to Defendants' Motion to stay, they stated that the "contracts" were not explained to them, and that they could not understand the technical Shearson "contract"; not just the arbitration clause. The Court believes that Plaintiffs cannot avoid the application of *Prima Paint* by simply alleging the fraud on the clause itself when the substance of the complaint reveals fraud on the whole contract. Accordingly, Plaintiffs' claim of fraud in the inducement must be resolved in the arbitral forum.

B) *The Securities Act Claims*

In *Wilco v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1958), the United States Supreme Court held that predispute agreements to arbitrate claims that arise under

Securities Act of 1933 are not enforceable. The Court pointed to language in § 14 of the Securities Act of 1933, 15 U.S.C. § 77n, which declared "void" any "stipulation" waiving compliance with any "provision" of the Securities Act. The Supreme Court thus held that an agreement to arbitrate amounted to a stipulation waiving the right to seek a judicial remedy, and was therefore void. 346 U.S. at 434-435. Subsequent court decisions have preserved the vitality of this Supreme Court holding. *See Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238, 1240 n.1 (1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 826-827 (10th Cir. 1979); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977). Accordingly, the 1933 Securities Act claims cannot be arbitrated.

Although Defendants would fail on the 1933 Act claim, they would assert that the claims arising under § 10(b) of the Securities Exchange Act of 1934 are distinguishable and should not be governed by the *Wilco v. Swan* holding. In *Scherk v. Alberto Culvert Company*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), the Supreme Court failed to extend *Wilco* to § 10(b) claims. The Court stated that the provisions of the 1934 Act differed from those of the 1933 Act and thus the reasoning of *Wilco* was inapplicable.[2] Recently, in *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985), Justice White, in his concurrence, resurfaced the apparent

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2. The Supreme Court questioned the applicability of *Wilco* to a claim arising under § 10(b) of the Securities Exchange Act of 1934 because unlike the 1933 Act, the 1934 Act did not expressly give rise to a private cause of action. Additionally, since a cause of action under § 10(b) and Rule 106-5 is implied rather than express, the "waiver" provision under the 1933 Act would not be literally applicable.

difference between the two Acts but the Supreme Court's majority declined to directly resolve the question.

Notwithstanding the doubts raised by the Supreme Court, the case law in the Fifth Circuit is clear on the issue of the arbitrability of the 1934 Act. The Court has consistently held that Congress intended these claims to be non-arbitrable. *See, e.g., Mayaja, Inc. v. Bodkin, et al.*, No. 85-2762, slip op. 671, 679 (5th Cir. October 17, 1986); *Bustamante v. Rotan Mosle, Inc.*, No. 86-2300, slip op. 339, 340 (5th Cir. October 17, 1986); *Smokey Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 785 F.2d 1274, 1275 n.1 (5th Cir. 1986); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Basing their decisions upon an extension of the Supreme Court's analysis in *Wilco v. Swan*, these opinions adhered to the view that the similarities between the 1933 Securities Act and the 1934 Exchange Act far outweighed any differences that might exist.

Additionally, Defendants would assert that the recent Supreme Court decision in *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985) would diminish the vitality of its holding in *Wilco* and implicitly overrule the established precedent in the Fifth Circuit. Presented with this argument in *Mayaja, Inc. v. Bodkin, et al.*, No. 85-2762, slip op. 671 (5th Cir. October 24, 1986), the Fifth Circuit declined to give it much consideration. Instead, it elected to follow the established precedent in the Circuit and held, absent a clearer statement from the Supreme Court on the issue, that the 1934 Exchange Act claims are not arbitrable. *Id.* at 679. This Court must follow the precedent set forth

by the Fifth Circuit and rule that both the 1933 Securities Act claims and the 1934 Exchange Act claims are not arbitrable. Therefore, solely with regard to these claims, the Defendant's Motion to Compel Arbitration is hereby DENIED.

C) *The RICO Claims*

The question of whether private RICO claims may be arbitrated is the subject of a split of authority among the Circuit Courts. The Second Circuit, in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (86-44), held that no RICO claims were ever arbitrable, regardless of the predicate offenses asserted. The Third Circuit, in contrast, held in *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986) that RICO claims may be arbitrated when the offenses predicate to the required "pattern of racketeering activity" are arbitrable.[3] The Fifth Circuit, until its recent decision in *Mayaja, Inc. v. Bodkin*, No. 85-2762, slip op. 671 (5th Cir. October 24, 1986), had not expressly ruled on the issue.[4] In the decision, the Fifth

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3. Therefore, if the Third Circuit were controlling, and the predicate offenses alleged were separate acts of wire and mail fraud, the RICO claims founded under 18 U.S.C. § 1341 and § 1342 would be arbitrable. If, however, the Securities Act violations were the predicate offenses alleged, the claims would be non-arbitrable pursuant to *Wilco v. Swan* and subsequent decisions. *Supra.*

4. In *Smokey Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280-82 (5th Cir. 1986), the Fifth Circuit addressed, in dicta, the issue of arbitrability of private RICO claims. On petition for rehearing en banc, the Court noted that its reasoning was called into question by *Mitsubishi*. The Court thereafter amended its opinion "to refuse to decide the arbitrability *vel non* of the plaintiff's RICO claim." *Id.* at 1282.

Circuit held that private RICO claims must be submitted to arbitration if a valid clause encompasses the claims. *Id.*

In order for a statutory claim like the civil RICO statute to overcome the overriding federal policy in favor of arbitration, it is necessary to show that Congress intended the statutory claim to be non-arbitrable. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). In reaching its decision in *Mayaja, Inc.*, the Panel relied on the legislative history of the civil RICO statute; specifically, section 1964(c), the treble damages provision. Finding nothing in the express intent of Congress, the Panel examined the underlying purpose of the statute to determine whether Congress implicitly intended that all such claims be non-arbitrable. The Panel then relied on the Supreme Court's examination in *Mitsubishi* of section 4 of the Clayton Act.[5] 105 S.Ct. at 3358-60. The Panel agreed with the Supreme Court's assessment that the treble damages provision served a crucial deterrent function. In citing *Mitsubishi* at 3359, however, they found that the "action . . . seeks *primarily* to enable an injured competitor to gain compensation for that injury." Therefore, since the deterrent function was secondary to the compensatory function, the statute would continue to serve both its remedial and deterrent functions "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mayaja, Inc. v. Bodkin*, No. 85-2762, slip op. 671 (5th Cir. October 24, 1986) *citing Mitsubishi*, 105 S.Ct. at 3359-60. Having paralleled *Mitsubishi's* analysis, the Panel found that the congressional purposes of compensation and deterrence underlying section 1964 (c) may be fulfilled by arbitration of the RICO claims. Thus, there was no evidence that Congress implied that all RICO claims were non-arbitrable.

5. The Panel reasoned that since the legislative history of section 1964(c) made repeated references to section 4 of the Clayton Act, these references to the Clayton Act could be adopted by reference to the purposes of the Clayton Act's treble damages provision.

Following the precedent set forth in *Mayaja, Inc.*, the Court accordingly rules that Plaintiffs' RICO claims are arbitrable and that the Defendants' Motion to Compel Arbitration of these claims is hereby GRANTED.

D) *The Deceptive Trade Practices Act Claim*

There is no Texas case law authority which would definitively determine whether Plaintiffs' case under the Texas Deceptive Trade Practices Act can or cannot be arbitrated. However, in *Ommani v. Doctor's Associates, Inc.*, 789 F.2d 298, 300 (5th Cir. 1986), the Fifth Circuit stated that enforcement of an otherwise valid arbitration clause cannot be denied solely by virtue of the suggestion that a claim is also based on the Texas Deceptive Trade Practices Act. The Panel cited the U.S. Supreme Court decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) for the proposition that states may not thwart the strong federal policy favoring arbitration. Although these statements are rather broad, the Court is persuaded that the Deceptive Trade claims can be arbitrated under the Federal Arbitration Act. Absent any clear Texas authority to the contrary, this Court is compelled to do so.[6] *See also Marley v.*

6. Plaintiffs assert the novel argument that the contract provision in this case is self-limiting and the federal preemp-

(Continued on following page)

Drexel Burnham, Inc., 566 F.Supp. 333 (N.D. Tex. 1983). Therefore, the Defendants' Motion to Compel Arbitration of the Texas Deceptive Trade Practices Act is hereby GRANTED.

E) *Motion To Dismiss The Section 17(a) Claims*

Although the Supreme Court has not ruled on the issue, the Fifth Circuit has clearly held that there is no private cause of action under Section 17(a) of the Securities Exchange Act of 1933. *Landry v. All American Assurance Company*, 688 F.2d 381 (5th Cir. 1982. The Court therefore concludes that Defendants' Motion to Dismiss under Rule 12(b)(6) (failure to state a claim upon which relief can be granted) is hereby GRANTED and the claims under § 17 be DISMISSED.

F) *The Stay Issue*

The Court hereby ORDERS that the non-arbitrable Securities Act claims proceed under this cause of action and those claims will not be stayed pending resolution of the arbitrable claims. *See Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. at 1245 (1985). Therefore, the Defendants' Motion to Stay Pending Arbitration will be DENIED with regard to the Securities Act claims. As only the Securities Act claims remain before this Court, all other claims asserted by Plaintiffs will be presented in arbitration.

Footnote continued—

tion doctrine would not be controlling. The relevant provision states: "Unless unenforceable due to federal or state law, any controversy . . . shall be settled by arbitration." Even if the arbitration would be unenforceable under Texas law, the Court cannot concede that the provisions in the language of this contract would override the Federal Arbitration Act.

It is so ORDERED.

DONE at Brownsville, Texas this 18th day of November, 1986.

/s/ Filemon B. Vela
Filemon B. Vela
United States District Judge

Ofelia RODRIGUEZ De QUIJAS, et al.,
Plaintiffs-Appellees,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express, Inc., and
Jon Grady Deaton,
Defendants-Appellants.

Mary Grace NORMAN,
Plaintiff-Appellee,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express,
Inc., etc., et al.,
Defendants-Appellants.

Adelina TRAPERO,
Plaintiff-Appellee,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express, Inc., Its
Successors and Assigns, and Jon Grady
Deaton, Jointly and Severally,
Defendants-Appellants.

Gene GRIFFIN and Gertrud Griffin,
Plaintiffs-Appellees,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express,
Inc., etc., et al.,
Defendants-Appellants.

Nos. 87-2888 to 87-2891.

United States Court of Appeals,
Fifth Circuit.

May 31, 1988.

Securities firm appealed from order of the United States District Court for the Southern District of Texas, Filemon B. Vela, J., which refused to order arbitration of claims under the Securities Act. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that claims under § 12(2) of the Securities Act are subject to predispute arbitration agreements.

Reversed.

1. Exchanges (Key) 11(11)

Claims under § 12(2) of the Securities Act are subject to predispute arbitration agreements. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 77*l*(2).

2. Exchanges (Key) 11(11)

Fact that, under Supreme Court precedent Securities Act claims were not subject to arbitration at time that arbitration agreement was signed between securities firm and customer did not mean that customers lacked the intent to arbitrate when they signed it so as to preclude arbitration of their claims under the Securities Act. Securities Act of 1933, § 12(2), 15 U.S.C.A. § 77*l*(2).

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

In these consolidated cases we confront the issue of whether claims brought under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (1982), are subject to predispute arbitration agreements. This issue arises in the wake of *Shearson/American Express, Inc. v. McMahon*, ... U.S. ....., 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), which enforced a predispute agreement to arbitrate § 10 (b) claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982). We find § 12(2) claims to be arbitrable, notwithstanding the earlier precedent of *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953).

I.

Appellees are individual investors in Brownsville, Texas, who suffered financial losses as the alleged result of unauthorized, fraudulent transactions in securities. Approximately $190,000 was invested by the Rodriguez De Quijas family; $38,000 by Mary Grace Norman; $100,000 by Adelina Trapero; and $80,000 by Gene and Gertrud Griffin. They sued appellants Jon Grady Deaton, the agent in charge of the accounts, and Shearson/American Express, Inc. ("Shearson"), pleading violations of various state and federal laws.[1] Appellant Shearson

1. Their common claims include violations of §§ 12(2) and 17(a) of the 1933 Securities Act, and §§ 10(b), 15(c)(1), 15(c)(2) of the Securities Exchange Act of 1934; civil RICO violations consisting of mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1961 (1982); securities fraud in violation of TEX.REV.CIV.STAT.ANN. § 581-33(A)(2) (Vernon 1964);

(Continued on following page)

moved to compel arbitration pursuant to an arbitration clause contained in the customer agreements signed by each appellee,[2] and in accordance with the Federal Arbitration Act.[3] The district court ordered arbitration of all claims except for the federal securities claims.

Footnote continued—

violations of the Texas Deceptive Trade Practices Act, TEX. BUS. and COMM. CODE ANN. § 17.46 *et seq.* (Vernon 1986); and common law breach of contract, fraud, and misrepresentation. The district court properly dismissed appellees' Securities Act § 17(a) claims under Fed.R.Civ.P. 12(b)(6), because this Court has held that there is no such private cause of action. *Landry v. All American Assurance Co.*, 688 F.2d 381 (5th Cir.1982).

2. Paragraph 13 of the Customer's Agreement provides:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, the transactions with you for me, or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc., or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within five (5) days after demand by you that I make such election then you may make such election. Judgment upon any award ordered by the arbitrators may be entered in any court having jurisdiction thereof.

3. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982) ("FAA"), mandates enforcement of agreements to arbitrate. *E.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The FAA states in pertinent part:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration on a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part, thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The district court correctly followed the Supreme Court's decision in *Wilko v. Swan, supra*, which clearly set out the invalidity of agreements to arbitrate § 12(2) claims under the Securities Act. And until recently, *Wilko* was interpreted in this Circuit as barring arbitration of Securities Exchange Act claims as well. *E.g. Mayaja, Inc. v. Bodkin*, 803 F.2d 157 (5th Cir.1986), *cert. denied in part* ..... U.S. ....., 107 S.Ct. 3210, 96 L.Ed.2d 697 (1987) *vacated in part*, ... U.S. ....., 107 S.Ct. 3205, 96 L.Ed.2d 692 (1987); *Bustamante v. Rotan Mosle, Inc.*, 802 F.2d 815 (5th Cir.1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir.1986) vacated, ... U.S. ....., 107 S.Ct. 3203, 96 L.Ed.2d 690 (1987). But the Supreme Court with *Shearson/American Express, Inc. v. McMahon, supra*, established the arbitrability of Securities Exchange Act claims. Appellant Shearson asserts this decision effectively overrules *Wilko* and allows arbitration of Securities Act claims.

Appellees do not contest the arbitrability of their Exchange Act claims following *McMahon*. They argue only that *Wilko* remains good law and prohibits arbitration of claims brought under § 12(2) of the Securities Act. Appellees argue further that even if § 12(2) claims are arbitrable, the parties lacked the requisite intent to agree to arbitration. We address these claims.

II.

The Supreme Court in *McMahon*, enforced a predispute agreement to arbitrate claims brought under § 10 (b) of the 1934 Exchange Act. *Supra*, ... U.S. at ....., 107 S.Ct. at 2343. In doing so, it refused under the 1934 Act to follow the reasoning of *Wilko v. Swan*, which invalidated predispute agreements to arbitrate 1933 Act

claims. *Wilko, supra*, at 438, 74 S.Ct. at 188-89. The *McMahon* majority opinion does not expressly overrule *Wilko;* the precise issue of the arbitrability of § 12(2) claims was not before the court.[4] Nevertheless, the reasoning in *McMahon* completely undermined *Wilko*, as this Court noted in *Noble v. Drexel Burnham Lambert, Inc.*, 823 F.2d 849, 850 n. 3. (5th Cir.1987) ("*McMahon* undercuts every aspect of *Wilko v. Swan* . . .; a formal overruling of *Wilko*, appears inevitable—or, perhaps, superfluous.").

The basic premise of *Wilko* is that a predispute agreement to arbitrate § 12(2) claims is invalid by virtue of § 14 of the Securities Act, 15 U.S.C. § 77n. (1982). Section 14 voids any stipulation "to waive compliance with any provision" of the Securities Act. The *Wilko* court held the jurisdictional provision of the Securities Act to be the type of non-waivable provision contemplated in § 14. *Wilko, supra*, 346 U.S. at 434, 74 S.Ct. at 186. The Supreme Court states in *McMahon*, however, that § 29 (a) of the Exchange Act, 15 U.S.C. § 78cc(a) (1982), which is a non-waiver provision virtually identical to § 14 of the Securities Act, does not bar predispute arbitration agreements. *McMahon, supra*, ... U.S. at ....., 107 S.Ct. at 2338-39.[5]

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4. The opinion states: "While stare decisis concerns may counsel against upsetting *Wilko's* contrary conclusion under the Security Act, we refuse to extend *Wilko's* reasoning to the Exchange Act. . . ." *McMahon, supra* ..... U.S. at ....., 107 S.Ct. at 2341.

5. The *McMahon* court reasons that § 29(a) voids only those agreements which waive "compliance" with provisions of the Exchange Act, and that because the jurisdictional provision of the Exchange Act does not impose substantive obligations with which to comply, nothing prevents its waiver. *Supra*,

(Continued on following page)

The Supreme Court reconciles *McMahon* with *Wilko* by characterizing the 1953 opinion as outdated in its bias against arbitration. The *McMahon* majority opinion reinterprets *Wilko*, as follows: "*Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue." *McMahon, supra*, at ....., 107 S.Ct. at 2339. As *McMahon* makes clear, the Supreme Court no longer considers arbitration inadequate to protect substantive rights. *Id.*, at ....., 107 S.Ct. at 2340-41. For this proposition, the court relied upon *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Moses H. Cone Memorial Hospital v. Mercury*

Footnote continued—

..... U.S. at ....., 107 S.Ct. at 2338. Section 27, the jurisdictional provision of the Exchange Act, 15 U.S.C. § 78aa (1982), is similar to the jurisdictional provision of the Securities Act. Section 27 of the Exchange Act states in part:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

Compare § 22(a), the jurisdictional provision of the Securities Act, 15 U.S.C. § 77v(a) (1982), which reads as follows:

> The district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). Advances in arbitration noted by the Supreme Court, particularly the broad oversight authority of the Securities Exchange Commission, *McMahon, supra*, ... U.S. at ....., 107 S.Ct. at 2341, apply equally to the protection of substantive rights under both the Securities Act and the Exchange Act.

[1] Appellees argue, however, that congressional intent is the crucial distinction between the two Acts. They claim that Congress, by preserving *Wilko* in the 1975 revisions of the Exchange Act, manifested its intent that at least § 12(2) claims should remain non-arbitrable.[6] We find it implausible that Congress intended to prohibit arbitration of Securities Act claims but intended to allow courts to determine the arbitrability of Exchange Act claims.[7] Similarly fine distinctions between the two Acts have been presented throughout the course of the debate over securities arbitration. *See, e.g., McMahon, supra*, at ....., 107 S.Ct. at 2347 n.n. 1-2 (Blackmun J., dis-

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6. The Conference Report accompanying the amendments to § 28(b) of the Exchange Act, 15 U.S.C. § 78bb(b), reads as follows:

> It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427 [74 S.Ct. 182, 98 L.Ed. 168] (1953), concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.

H.R.Conf.Rep. No. 229, 94th Cong., 1st Sess., 111 (1975), U.S. Code Cong. & Admin.News 1975, pp. 179, 342.

7. The Supreme Court states in *McMahon, supra*, ... U.S. at ....., 107 S.Ct. at 2343: "Hence, the *Wilko* issue was left to the courts; it was unaffected by the amendment to § 28(b)."

senting). We do not, however, find these asserted distinctions controlling on the issue of arbitration. The Supreme Court opinion in *McMahon*, which binds us here, turns solely on the adequacy of arbitration to resolve securities disputes. It does not distinguish between the Exchange Act and the Securities Act. Furthermore, it has been the position of this Court that, for the purposes of arbitration, similarities between the Securities Act and the Exchange Act outweigh any differences between them. *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 n. 3 (1976). We thus follow the reasoning of the Supreme Court in *McMahon* and our own decision in *Noble* which lead directly to the obsolescence of *Wilko* and the arbitrability of Securities Act § 12(2) claims.

III.

[2] Appellees claim that even if § 12(2) claims are arbitrable, the intent to agree to arbitration was lacking in their cases. At the time the agreements were signed, claim appellees, Securities Act claims were controlled by *Wilko* and clearly were not subject to arbitration. We cannot conclude that appellees lacked the intent to agree to arbitration because, at the time the customer agreements were signed, courts refused to honor clauses compelling arbitration of securities claims. At the time the contracts were signed, the same circumstances existed barring arbitration of Exchange Act claims. *E.g. Sibley, supra*, at 543. Appellees cannot now contend that they lacked the intent to arbitrate their Exchange Act claims in view of the Court's holding in *McMahon*. Neither the Supreme Court nor this Circuit considered that the earlier lack of authorization to arbitrate was an obstacle in *McMahon, supra* or *Noble, supra*. Both cases ordered

arbitration of Exchange Act claims under analogous circumstances.

Authority no longer exists to deny arbitration of the § 12(2) claims as the parties agreed in their contracts. Arbitration must be directed both as to the Securities Act claims and Exchange Act claims. That portion of the judgment of the district court which denied directing arbitration of the Securities Act § 12(2) claims is

REVERSED.

(Filed June 22, 1988)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2888, 87-2889, 87-2890
& 87-2891

Opelia RODRIGUEZ De QUIJAS, et al.,
Plaintiffs-Appellees,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express, Inc., and
Jon Grady Deaton,
Defendants-Appellants.

Mary Grace NORMAN,
Plaintiff-Appellee,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express, Inc.,
etc., et al.,
Defendants-Appellants.

Adelina TRAPERO,
Plaintiff-Appellee,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express, Inc., Its
Successors and Assigns, and Jon Grady
Deaton, Jointly and Severally,
Defendants-Appellants.

Gene GRIFFIN and Gertrud Griffin,
Plaintiffs-Appellees,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a Shearson/American Express, Inc.,
etc., et al.,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(June 22, 1988)

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge